92-805

No.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

TIMOTHY A. DeWITT, ET AL.,
APPELLANTS

v.

THOMAS S. FOLEY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

In this case officers of the state and federal governments attempt to compel the sovereign people of California to select their federal congressional delegation through a racially segregative districting plan formulated by unelected members of the California Supreme Court. The questions presented by this case are:

1. Whether the federal government has power substantively to apportion federal Representatives within, as opposed to among, the sovereign States.

2. Whether the California Supreme Court is "the Legislature" of California within the meaning of the Elections Clause of the U.S. Constitution (art. I, sec. 4).

3. Whether the Fourteenth Amendment's prohibition against "separate but equal" laws which has been applied, among other things, to public schools, beaches, and golf courses, also applies to congressional election districts.

4. Whether requiring federal voters to vote in district contests in which as many as six to seven times (600% to 700%) as many voters vote in some suburban and rural districts compared to other, urban districts violates the constitutional requirement of "one person, one vote."

5. Whether congressional voters and candidates qualified directly in and by the federal Constitution (Art. I, sec. 2, cls. 1 & 2) may be permitted, or required, by federal law (2 U.S.C. 2c) simultaneously to participate in contests

selecting fully 100% of the congressional delegations in, for example, the small States of Alaska and Wyoming, but less than 2% of the delegation for the sovereign, large State of California.

6. Whether federal Congress may mandate that State legislatures and the sovereign people of the States (or state and federal courts) affirmatively draw or establish congressional districts.

7. Whether Framers considered intra-state territorial residency restrictions to be "fundamental" to the American political system, and even assuming they did, whether their failure to express or incorporate this belief in the new, written Constitution demonstrates that they intended such restrictions to be subject to ordinary Constitutional review.

8. Whether minority voting groups of all types (e.g., racial minority groups, or the minority Republican political party) must have the opportunity to elect Members of the U.S. House of Representatives in numbers proportionate to their actual voting strength in the sovereign States.

PARTIES TO THE PROCEEDINGS

The appellants here, who were plaintiffs in the district court, are Timothy A. DeWitt, Pamela R. DeWitt-Carter, Dorothy S. Baldwin, residents and qualified federal voters of the State of California, and Rene A. Rivas, a resident and qualified federal voter from the Commonwealth of Virginia.

The appellees in this Court, defendants below, are Thomas S. Foley, Speaker of the United States House of Representatives; Pete Wilson, Governor of the State of California; and March Fong Eu, Secretary of State of the State of California.

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App. A, infra), is not yet reported.

JURISDICTION

The judgment of the three-judge district court (App. A, infra) was filed on August 31, 1992. The notice of direct

appeal (App. B, infra) was filed on September 11, 1992. The appellate jurisdiction of this Court is invoked under 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Voter Qualifications Clause, art. I, § 2, cl. 1; Candidate Qualifications Clause, art. I, § 2, cl. 2; Apportionment Clause, art. I, § 2, cl. 3; Elections Clause, art. I, § 4; Guarantee Clause, art. IV, § 4; Speech Clause of the First Amendment, amend. I; Tenth Amendment, amend. X; Equal Protection Clause of the Fourteenth Amendment, amend. XIV, § 1; Due Process Clause of the Fourteenth Amendment, amend. XIV, § 1; Fifteenth Amendment, amend. XV, § 1; Nineteenth Amendment, amend. XIX, § 1; and Twenty-sixth Amendment, amend. XXVI, § 1, of the

United States Constitution; and the federal Voting Rights Act, 42 U.S.C. 1971, et seq.; 2 U.S.C. 2c (1967); Art. XXI, § 1 of the California Constitution; Sec. 100(a) of the California Elections Code; and Sec. 25000(a) of the California Elections Code, are reproduced at App. C, infra.

STATEMENT

A. THE CALIFORNIA SUPREME COURT IS NOT 'THE LEGISLATURE' OF CALIFORNIA WITHIN THE MEANING OF THE ELECTIONS CLAUSE OF THE UNITED STATES CONSTITUTION

The Elections Clause of the United States Constitution, art. I, sec. 4, provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature...." (Emphasis supplied.) In the case of

Smiley v. Holm, 285 U.S. 355 (1932), this Court considered a dispute involving the question, in view of this requirement, of whether the popularly elected Governor of a State could participate in the State's congressional redistricting process. The Governor of Minnesota had vetoed a redistricting plan supported and proposed by the state legislature. State elections officials nonetheless attempted actually to implement the legislature's plan. The dispute eventually reached this Court. Construing the words "the Legislature" broadly to mean the ordinary legislative or law-making process in the State, the Court concluded, per Chief Justice Hughes, that the popularly elected Governor of the State was an integral part of the ordinary legislative or law-making process in the State and

could therefore legitimately participate in the formulation of new congressional districting plans. In the end, statewide or at-large elections were eventually ordered for Minnesota's congressional elections that year.[1]

This Court's reasoning in Smiley v. Holm applies directly to the facts of the instant case. The California State Legislature presented a new congressional districting plan to the Governor for his approval. On September 23, 1991, the Governor vetoed the plan and, on the same day, the legislature failed to override

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[1] Cf. Brown v. Saunders, 159 Va. 240, 166 S.E. 105 (1932) (at-large elections also ordered) with Baker v. Carr, 369 U.S. 186 (1962) (federal malapportionment disputes justiciable in Art. III courts), and subsequently Assembly v. Deukmejian, 30 Cal.3d 638, 180 Cal. Rptr. 297 (1982) (per Bird, C.J.) (redistricting plan explicitly rejected by the people of the State through direct referendum nonetheless ordered enforced by state high court under purported authority of federal 2 U.S.C. 2c (1967)).

the Governor's veto. Later, the Governor, in both his official and personal capacities, pursued an original action against the Secretary of State, the State's chief elections officer, before the California Supreme Court -- all in a transparent bid to cut the popularly elected state legislature out of the redistricting process altogether and to have unelected members of the state high court eventually formulate a new plan in their stead. See Wilson v. Eu, 54 Cal.3d 471, 286 Cal. Rptr. 280, 816 P.2d 1306 (Sept. 25, 1991). Finally, on January 27, 1992, the California Supreme Court obliged and announced its own congressional redistricting plan. See Wilson v. Eu, 1 Cal.4th 707, 4 Cal. Rptr. 2d 379, 823 P.2d 545 (1992).

Following this Court's reasoning in

Smiley v. Holm, however, the words "the Legislature" in the Elections Clause of the U.S. Constitution simply cannot be construed so broadly as to include the California Supreme Court. If the popularly elected legislators of the State, and Congress, decline for whatever reason to exercise their exclusive authority under the Elections Clause to draw new congressional districts for California, the unavoidable federal Constitutional result is plain: there shall be no new districts. The state Supreme Court is demonstrably not, like the Governor in Smiley, part of the ordinary legislative or law-making process in California, and therefore simply cannot be said to be part of "the Legislature" of California within the meaning of the Elections Clause.

Defendant-Appellees Foley, Wilson and Fong Eu lack authority to hold or conduct California's congressional elections according to the districting plan formulated and proposed by the California Supreme Court.

B. GOVERNMENT OF THE UNITED STATES MAY NOT MANDATE THAT GOVERNMENT OF THE STATE OF CALIFORNIA, OR PEOPLE OF CALIFORNIA, DRAW OR ESTABLISH SINGLE-MEMBER CONGRESSIONAL ELECTION DISTRICTS

In the case of New York v. United States, 112 S. Ct. 2408 (June 19, 1992), this Court reviewed and invalidated a federal "take title" provision mandating in effect that sovereign States take certain specified actions or become titleholder to unwanted nuclear waste materials. In refusing effect to this provision, the Court re-affirmed that:

> States are not mere political subdivisions of the United

> States. State governments are neither regional offices nor administrative agencies of the Federal Government.
>
> In providing for a stronger central government,... the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.

112 S. Ct., at 2423, 2434. In the instant action, Appellants challenge 2 U.S.C. 2c (the federal single-member districting statute) on the basis that it mandates that the States perform the affirmative political or legislative act of drawing or establishing single-member districts. Appellants argue that this mandate violates the plain terms of both the Elections Clause and the Tenth Amendment -- as well as States' rights to independent, republican governments under

the Guarantee Clause.[2]

This precise question appears to have been finally resolved by the House of Representatives' own actions -- exactly consistent with this Court's analysis in New York v. United States, supra -- in the year 1844.

In the congressional elections immediately following passage of Congress' first federal districting statute (see 5 Stat. 491 (1842)), four states -- New Hampshire, Georgia, Mississippi, and Missouri -- nonetheless again elected statewide/at-large delegations to represent them in Congress. The Committee on Elections was tasked to study the question and report

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[2] For Appellants' federalism argument under the Guarantee Clause, see generally Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1 (1988).

back to the whole committee of the House.

On January 22, 1844, the Committee majority, per Stephen A. Douglas (D-Ill.), Committee Chairman, concluded that the four statewide delegations must be recognized and seated as bona fide members of Congress. The Committee reasoned that the federal government simply lacked power under the Elections Clause, or any other Constitutional provision, in effect to instruct or order the sovereign States actually to draw or establish the required districts:

> The right to change State laws or to enact others which shall suspend them, does not imply the right to compel the State Legislatures to make such changes or new enactments. (Specifically construing the Elections Clause.)
>
> The constitution contains no grant of power to Congress to superintend and control and direct the legislation of the States.

> The great radical evil in the articles of confederation, was the constant collisions between the Federal and State Governments, produced by the laws of the former operating upon the latter in their corporate and sovereign capacities, instead of binding the people individually.

Relative to the Right of Members to Their Seats in the House of Representatives, H.R. No. 60, 28th Cong., 1st Sess. (1844), at pp. 6-7.

In the instant case, the California State Legislature and Governor, functioning collectively as "the Legislature" of California directly under the Elections Clause of the U.S. Constitution (art. I, sec. 4) -- after failing to identify any set of congressional districts they could support -- decided not to establish the required new election districts.

Like "the Legislatures" from New

Hampshire, Georgia, Mississippi, and Missouri almost 150 years earlier, they declined to follow the federal mandate in 2 U.S.C. 2c (1967) (virtually identical in wording and effect to 5 Stat. 491 (1842)) that they draw and establish new single-member districts. Nonetheless, and in literally complete disregard of the plain terms of the Elections Clause (both independently and as construed by this Court in Smiley v. Holm, 285 U.S. 355 (1932)), on January 27, 1992, the California Supreme Court itself formulated and proposed new congressional districts for California. See Wilson v. Eu, 1 Cal.4th 707, 4 Cal. Rptr. 2d 379, 823 P.2d 545 (1992). In effect, then, at the behest only of the person of the Governor, and additionally with subsequent voluntary compliance from only

the person of the Secretary of State, the California Supreme Court stepped in falsely to enforce a federal districting mandate which has been understood for almost 150 years -- and by the U.S. House of Representatives itself -- to be constitutionally void and therefore simply unenforceable.

The Government of the United States may not instruct, order, mandate, or in any other way require the sovereign people and State of California to take the affirmative political action of establishing or drawing new congressional election districts. Defendant-Appellee state and federal governmental officers and administrators Foley, Wilson, and Fong Eu therefore simply lack power to hold or conduct California's congressional elections through (or apply

territorial residency restrictions to) the districting plan falsely formulated and proposed by the California Supreme Court on January 27, 1992.

C. FEDERAL AND STATE GOVERNMENTS LACK POWER TO APPORTION FEDERAL REPRESENTATIVES WITHIN, AS OPPOSED TO AMONG, THE SOVEREIGN STATES OR TO IMPOSE ADDITIONAL SUB-STATE TERRITORIAL RESIDENCY RESTRICTIONS ON VOTERS AND CANDIDATES ALREADY QUALIFIED DIRECTLY IN AND BY THE U.S. CONSTITUTION

1. Voter and Candidate Qualifications Clauses of the United States Constitution Bar Additional Sub- or Intra-state Voter and Candidate Territorial Residency Restrictions.

The Voter and Candidate Qualifications Clauses of the U.S. Constitution, Article I, § 2, cls. 1 & 2, directly establish the qualifications of voters and candidates in elections for the U.S. House of Representatives. The voter clause imposes one qualification:

voters "shall have the qualifications requisite for electors of the most numerous branch of the state legislature." Art. I, § 2, cl. 1. The candidate clause, for its part, imposes three qualifications: candidates "[must] [1] have attained to the age of twenty five years, [2] have been seven years a citizen of the United States, and ..., [3] when elected, be an inhabitant of the state in which [they] shall be chosen." Art. I, § 2, cl. 2.

James Madison and Alexander Hamilton explained in separate contributions to the Federalist Papers the rationale for directly controlling the qualifications of federal voters and candidates in the new Constitution. In Federalist No. 52, James Madison wrote that:

> The first view to be taken of [the House of Representatives]

> relates to the qualifications of the electors and the elected. Those of the former are to be the same with those of the electors of the most numerous branch of the State legislatures. The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. ... The qualifications of the elected...have [also] been very properly considered and regulated by the convention.

Federalist Papers, No. 52 (I. Kramnick ed., 1987), p. 323. See also 2 J. Story, Commentaries on the Constitution of the United States § 626, at 101-102 (1970 ed.). In Federalist No. 60, Alexander Hamilton responded to anti-federalist criticism that the proposed Elections Clause (Art. I, § 4) would give too much power over congressional elections to the federal government. Hamilton replied that:

> Its [the federal government's] authority would be expressly

> restricted to the times, the places, and the manner of elections. The qualifications of the persons who may choose [voters] or be chosen [candidates], as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.

Federalist Papers, No. 60 (I. Kramnick ed., 1987), p. 360 (emphasis in original). The plain meaning of both the Voter and Candidate Qualifications Clauses -- as supported by contemporaneous written accounts of two of the leading architects of the federal Constitution -- then, is that the entire subject of the qualifications of federal voters and candidates is directly controlled and occupied by the U.S. Constitution itself.

Following the Framers' lead, the courts and Congress have always adopted the same clear view of the qualifications

clauses. In Ex parte Yarbrough, 110 U.S. 651 (1884), for example, this Court held that:

> The states, in prescribing the qualifications of voters for the most numerous branch of their own legislatures do not do this with reference to the election for members of Congress. Nor can they prescribe the qualifications for voters for those eo nomine. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that state.

110 U.S. at 663. And, sixteen years later, the Court explicitly re-affirmed this view in the case of Wiley v. Sinkler, 179 U.S. 58, 63-64 (1900), quoting in full its own prior statement on the subject. In 1911, the Fifth Circuit made clear in the case of Felix v. United States, 186 F. 685 (5th Cir.

1911), that the purpose of the Voter Qualifications Clause was simply to identify all those persons statewide who are qualified to participate in a State's federal congressional elections:

> The states were left free to prescribe the qualifications of voters for the most numerous branch of their own Legislatures. When they have done so, such voters are made by the Constitution qualified electors to vote for members of the House of Representatives. They have no authority to directly prescribe such qualifications. They provide who shall vote for the popular branch of their legislatures, and the Constitution confers on such electors the right to vote for members of the House of Representatives of the United States.

Id. at 689. In the more modern case of Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986), this Court again followed the Framers' plain view of the qualifications clauses. In

Tashjian, the Court faced a rule of Connecticut's Republican party having the effect of expanding the set of voters participating in its congressional primary elections over that permitted to vote in its state primary elections. The Court majority concluded that the party rule did not violate the Voter Qualifications Clause precisely "because it [did] not disenfranchise any voter in a federal election who is qualified to vote in a primary or general election for the more numerous house of the state legislature." 479 U.S. at 229 (emphasis supplied).

Notably, two Justices took an even stricter view of the clause in dissent. Justice Stevens, with Justice Scalia joining, would have held that the clause prohibited even the effect, resulting

from the internal nominating rules of a private political party, of relaxing the qualifications of voters in federal, as opposed to state, primary elections. 479 U.S. at 230-37.

This Court, then, has consistently ruled, from Ex Parte Yarbrough in 1884 through Tashjian as recently as 1986, that the Voter Qualifications Clause itself controls the subject of the qualifications of federal voters and that no additional qualifications may be imposed by the States or Congress.

The courts' approach to the Candidate Qualifications Clause has been no less clear. In the leading case of Powell v. McCormack, 395 U.S. 486 (1969), for example, this Court considered an attempt by the U.S. House of Representatives in effect to expel

Representative Adam Clayton Powell (D-N.Y.) for alleged ethics violations by simple majority vote. After an exhaustive review of the history and meaning of the Candidate Qualifications Clause (including the writings of Framers Madison and Hamilton discussed above), the Court concluded that the House of Representatives had no power in effect to disqualify Representative Powell from his seat in the House precisely because he in fact met all of the maximum (1) age, (2) length-of-citizenship, and (3) state-residency requirements imposed by the Candidate Qualifications Clause.[3]

The plain meaning of the text of the qualifications clauses themselves, the

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[3] See also State ex rel. Johnson v. Crane, 65 Wyo. 189, 197 P.2d 864 (1948) (collecting qualifications clause authority as of that date in invalidating state restriction against sitting Governor running for Congress).

contemporaneous writings of leading Framers, and repeated statements by this Court across two centuries (and in modern times), all make clear that the Voter and Candidate Qualifications Clauses of the U.S. Constitution occupy the entire subject of the qualifications of federal voters and candidates, respectively, and that the States and Congress therefore simply lack power to impose additional qualifications on either subject.

a. District residency restrictions impose impermissible additional 'qualifications' on all Constitution-qualified federal voters and candidates within the sovereign States.

In congressional election of 1806, William McCreery of Maryland won election to one of the two seats available in a two-member district around the City of Baltimore. Questions subsequently arose, however, whether Mr. McCreery satisfied

Maryland's state-law requirement that he live in a particular section of that district to be elected. Eventually the dispute was presented to the House of Representatives in the form of a contested election case. After considerable deliberation, the House of Representatives finally recognized and seated Mr. McCreery as a Representative from Maryland. In the process, the House specifically disregarded Maryland's own territorial residency requirement on the grounds that it constituted an impermissible additional qualification violative of the Candidate Qualifications Clause. See 1 A. Hinds, Precedents of the House of Representatives § 414, at 381; 17 Ann. of Cong. 1237 (1807); M. Clark, Cases of Contested Elections in Congress, from the Year 1789 to 1834,

Inclusive (1834). And this early precedent of the House of Representatives was specifically approved by this Court in the leading qualifications clause case of Powell v. McCormack, supra.

Notably, this early precedent of the House of Representatives also held strong influence in the debate, nearly 35 years later, over Congress' first attempt to impose a federal single-member districting requirement. See 5 Stat. 491 (1842). Senator Bagby of Alabama, for example, made the following similar argument related specifically to the Voter Qualifications Clause:

> I assert, upon the authority of the Federal Constitution, that each voter, in each of the states of this Union, having the requisite qualifications to vote for members of the most numerous branch of the State Legislature, has a right to vote for the whole number of Representatives to which such

> state, according to numbers, is entitled.

Congressional Globe, 27th Cong., 2d Sess., at 583 (App. 1842). And Representative Payne, also of Alabama, made the following almost identical argument relating to the Candidate Qualifications Clause:

> But, we are told by gentlemen that it is not contemplated to confine the Representative to a particular district. I ask, if the practical operation of the system would not confine him to the district of which he would be the Representative -- at least as far as he would be known or recognized upon this floor? If so, you would indirectly add a qualification to the Representatives in Congress, which, many of you admit you could not do directly. Now, I deny that Congress has the power to do indirectly that which cannot be done directly.

Congressional Globe, 27th Cong., 2d

Sess., at 361 (App. 1842).[4] Two years later, these attacks against the constitutionality of 5 Stat. 491 (1842) were in effect fully adopted by the House of Representatives. In the elections immediately following passage of the new federal districting law, four states -- New Hampshire, Georgia, Mississippi, and Missouri -- ignored the new districting

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[4] And Representative Payne's concern has indeed been borne out by subsequent American history. See J. Bryce, The American Commonwealth 487 (1913) ("Nothing more contributes to make reform difficult than the inveterate habit of choosing residents only as members."); L. Schmeckebier, Congressional Apportionment, Studies in Administration No. 40, Brookings Institution (1941), p. 140 ("Occasionally a representative is not a resident of the district he represents, but such instances are few and far between."); "Congress of the United States," The Software Toolworks Illustrated Encyclopedia, Grolier Electronic Publishing, Inc. (1990) ("Although members of the House are required only to be inhabitants of their states, and not necessarily inhabitants of the districts from which they are elected, in fact local residency has become an unwritten, or customary, requirement for success at the polls.").

law and again sent delegations elected statewide to represent them in the House. In response, the House finally concluded that it had no choice but to recognize and seat the statewide delegations precisely on the grounds that Congress' new districting law was indeed unconstitutional.[5]

Senator Bagby and Rep. Payne's arguments gained additional support from the courts almost 120 years later. In the cases of Hellmann v. Collier, 217 Md. 93, 141 A.2d 908 (1958); Exon v. Tiemann, 279 F. Supp. 609 (D. Neb. 1968); and State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968), courts faced identical efforts by the States of

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[5] See Relative to the Right of Members to Their Seats in the House of Representatives, H.R. No. 60, 28th Cong., 1st Sess. (Jan. 22, 1844) (per Stephen A. Douglas (D-Ill.), Chair, Committee on Elections).

Maryland (again), Nebraska, and New Mexico, respectively, to require candidates for congressional office personally to live in the districts they sought to represent. Each of the single-member district residency requirements in question were invalidated by the courts as impermissible additional "qualifications" barred directly by the Candidate Qualifications Clause.

In Federalist No. 52, James Madison articulated a additional, special reason for fixing voting qualifications in the new Constitution:

> To have submitted [the definition of the right of suffrage] to the legislative discretion of the state would have been improper [because suffrage is a fundamental article of republican government]..., and for the additional reason that it would have rendered too dependent on the State governments that branch of the federal

> government [U.S. House of Representatives] which ought to be dependent on the people alone.

Federalist Papers, No. 52 (I. Kramnick ed., 1987), p. 323 (emphasis supplied). The Voter Qualifications Clause thus has the basic structural purpose of protecting the people of the States against the substantive encroachment of their own state governments into the process of selecting the States' federal congressional delegations.

District residency restrictions, however, have a massive substantive effect on the selection of state congressional delegations. Local ideas and interests are vaulted over competing, cross-district, statewide ideas and interests. (Itself contributing in great part to the fiscally draining phenorenon of "pork-barrel" spending in Congress.)

Minor and minority non-geographical voting coalitions of all types (including young voters, women, and racial minorities) are virtually blocked from obtaining any, let alone proportional, representation in Congress. Incumbents are protected from ever having to compete against each other for re-election. Incumbents are then free simply to fend off beleaguered challengers (and their supporters) within their own small districts. And the phenomenon of partisan political "gerrymandering," an intractable problem that has vexed, among many others, this Court,* is itself made possible only through the existence of voter and candidate district residency restrictions. And the list goes on and

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* See Davis v. Bandemer, 478 U.S. 109 (1986).

on.

In sum, for at least 185 years in America it has been bedrock constitutional doctrine that intra-state district residency restrictions impose impermissible additional "qualifications" on congressional candidates protected by the Candidate Qualifications Clause of the United States Constitution. The same basic understanding simply must also apply to voter residency restrictions under the exactly parallel Voter Qualifications Clause. In addition, as recognized by Members of Congress as early as 1842 (and specifically alleged in this case below), voter residency restrictions themselves also impose virtually insurmountable, de facto restrictions on, again, all candidates.

The district residency restrictions imposed by 2 U.S.C. 2c and sec. 100(a) of the California Elections Code violate Appellants' fundamental federal political rights protected in each of the paramount Voter and Candidate Qualifications Clauses of the United States Constitution.

2. Under Plain Meaning and Structure of the Voter and Candidate Qualifications, Apportionment, and Elections Clauses of the U.S. Constitution, Federal and State Governments Simply Lack Power Substantively to Apportion Representatives WITHIN, as opposed to AMONG, the Sovereign States.

The Apportionment Clause of the U.S. Constitution, both originally and as restated in the Fourteenth Amendment (U.S. Const. art. I, § 2, cl. 3 & amend. XIV, § 2), provides simply that Representatives "shall" be apportioned

"among" the States. As made clear by Congress' use of the "Apportionment Bill" when it first attempted to mandate single-member districts, however, both Congress (through 2 U.S.C. 2c) and the State of California (through Cal. Const. art. XXI, § 1 and § 100(a) of the elections code) now attempt illegitimately to apportion seats, and thus Representatives, within, as opposed to among, the States.[7]

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[7] And apportioning Representatives within, as opposed to among, the States has a strong substantive impact on the electoral rights of all qualified federal voters. As specifically alleged by Appellants in their complaint in this action, sub-state apportionment transfers electoral power (1) from the class of all qualified and actual voters to all non-voters, (2) from the voters of large States to the voters of small States (and this was precisely by the design of small-State members of the U.S. Senate in 1842), and (3) from actual voters in contests with high voter turnout to actual voters in districts with low vote totals. The effect is devastating specifically on the Californian Appellants here who are all (1) actual voters, (2) from a large State (California), and (3) a

The Elections Clause of the United States Constitution, for its part, simply does not encompass (bears no relation to) the substantive function of apportionment. As Chief Justice Hughes emphasized in Smiley v. Holm, 285 U.S. 355 (1932), this clause authorizes only those regulations "as to procedure" that are "necessary" actually to administer elections and to protect "the fundamental right involved." 285 U.S. at 366. Apportionment, by contrast, involves the substantive allocation of seats, before the election itself, to pre-determined groups of people or voters. Neither the Apportionment nor the Elections Clauses authorizes the substantive apportionment of seats and Representatives within, as

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district with a comparatively high rate of voter participation.

opposed to among, the States.[8]

In any case, however, the Voter Qualifications Clause of the U.S. Constitution (art. I, § 2, cl. 1) itself independently specifies exactly how Representatives are to be selected, and thus seats allocated, within the States: "The House of Representatives shall be composed of Members chosen every second year by the people of the several states [by qualified voters, in elections]...."

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[8] If supporters of district residency restrictions now want to authorize the federal government to apportion Representatives within, as opposed to among, the sovereign States, however, they must first amend the Constitution's plain, structural provisions already affirmatively prohibiting such a practice. Cf. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (invalidating direct tax as violative of the exactly parallel taxation prong of the Apportionment Clause in period before ratification of the 16th Amendment). Note, however, that repeated efforts in our history to amend the Constitution to require single-member districting have all failed. See Remarks of Sen. Graham, Cong. Globe, 27th Cong., 2d Sess., at 748-49 (App. 1842).

While Representatives are "apportioned" among the States, then, they are to be "chosen" by qualified voters (in competitive, including geographically competitive, elections) within the States. Any attempt to pre-determine who will end up getting exactly what representation before an election even occurs, however, simply undermines the very idea of open, free, and competitive elections.

The apportionment of seats within, as opposed to among, the State is not only not authorized in the Apportionment or Elections Clauses, it violates the very notion of free and competitive elections mandated in the Voter Qualifications Clause.

3. Fundamental Principle of Majority Rule, or Popular Consent, Protects Rights of All Political and Other Minority Voting Groups to

Elect Representatives in Numbers Proportionate to Their Actual Voting Strength.

The Guarantee Clause of the U.S. Constitution (art. IV, sec. 4) provides in part that "[t]he United States shall guarantee to every State in this Union a Republican form of Government." The Framers understood the "republican form of government" to be a modified form of pure democracy in which, instead of meeting in person to enact laws for the state, the people would elect representative assemblies or legislatures in effect to govern on their behalf. Leading Framers were keenly aware of the paramount importance of the processes by which these new representative assemblies would be selected. John Adams, for example, wrote in April 1776 that:

The principal difficulty lies,

> and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other words equal interests in the people should have equal interests in it. Great care should be taken to effect this and to prevent unfair, partial, and corrupt elections.

J. Adams, Thoughts on Government (1776), excerpted in The Founders' Constitution: Major Themes at 108 (P. Kurland & R. Lerner eds.) (1987). Adams' emphasis on what he termed "equal representation" stemmed from the understanding that representative assemblies existed simply to simulate what the people would do if they could meet and govern in person. The core rationale behind pure democracy -- majority rule or popular consent --

was to be left fully intact in the new, republican governments.

The district residency restrictions at issue in this case violate the U.S. Constitution's guarantee of republican government. They create artificial, winner-take-all contests across the State in which local majorities (51% segment) are permitted to select all (100%) of the representation available in each district. In the process, John Adams' goal of "equal representation" -- producing in the legislature the desired "exact portrait" of the people -- becomes unobtainable. Major and majority ideas and interests of all kinds are systematically over-represented in the legislature. As a result, the very idea of "majority rule" or "popular consent" generally is itself irretrievably denied.

Mere majorities (in the legislature) of majorities (in the elections) (26% segments) of the people at large become empowered to enact legislation governing all (100%) of the people.

In sum, the judicially discoverable and manageable standard of "majority rule" or "popular consent" makes clear that the district residency restrictions at issue in this case violate the U.S. Constitution's fundamental guarantee of republican government. As specifically anticipated by John Adams as early as April 1776, in the republican form of democracy, election laws must not in any way impair or impede the ability of minority voting segments to obtain "equal," or proportional, representation in multi-member representative or legislative bodies.

D. DISTRICT COURT APPLIED WRONG STANDARD OF REVIEW IN SUMMARILY DISMISSING APPELLANTS' NINE SEPARATE CLAIMS FOR RELIEF BASED ON VARIOUS PROVISIONS OF THE FIRST THROUGH TWENTY-SIXTH AMENDMENTS TO THE CONSTITUTION

In dismissing each of Appellants' nine separate claims based on various amendments to the Constitution, the district court applied the following entirely new and unprecedented standard of review:

> District elections are so fundamental to the political system devised by the Framers in the Constitution that none of the amendments to the Constitution should be construed to alter it by inference.

Opinion and Judgment of Dismissal, App. A, infra, at p. 35. With this summary new statement, the district court disposed of fully NINE of Appellants' claims based on such otherwise fundamental constitutional provisions as

the Free Speech Clause of the First Amendment; the Tenth Amendment; the Equal Protection and Due Process Clauses of the Fourteenth Amendment; and each of the Fifteenth, Nineteenth, and Twenty-sixth Amendments (specifically protecting the rights of all racial minority, female and young voters). In essence, the district court held through this single sentence that, no matter how powerfully (or even deliberately or intentionally) single-member district residency restrictions (are used to) discriminate against (1) all female voters and candidates (and women are currently 1900% less represented in the U.S. House of Representatives than men); (2) all challenger candidates and their supporters (and incumbents today are often re-elected at rates in excess of 96

to 98%); (3) all minor or minority racial and ethnic voters and candidates (also specifically protected in the federal Voting Rights Act, 42 U.S.C. 1971, et seq.); or (4) members of the minority Republican political party (and the competing majority Democrat party has held an absolute majority of the seats of the U.S. House of Representatives for fully 56 of the last 60 years in America), the courts nonetheless may not review these restrictions against the Bill of Rights, or any other subsequent, written amendments to the Constitution. The district court applied the wrong standard of review in summarily dismissing fully nine of Plaintiff-Appellants' separate claims for relief in this case.

1. District Residency Restrictions Violate Core Political Rights Protected Under Various Written Amendments to the Constitution.

(a) One person, one vote.

In proposing its new districting plan, the California Supreme Court failed even to consider actual voting patterns across the State. The Court in effect treated bare population equality among various districts as a kind of "safe haven" against all claims of unequal electoral influence under the Voter Qualifications and Equal Protection Clauses.

California's new districting plan, however, yields enormous deviations in actual votes cast from district to district, resulting in dramatic inequality in actual electoral influence across the State. In California's June 1992 primary, for example, approximately

six to seven times (600 to 700%) more voters turned out in each of the Republican-leaning Sixth and Tenth Congressional Districts in suburban/rural northern California as compared to the strongly Democrat-leaning Thirty-Third Congressional District located in urban southern California.

The new plan's effect on actual electoral influence across the State is also disturbingly systematic. It appears to skew electoral influence in part (1) toward southern and away from northern California; (2) toward urban areas and away from suburban and rural areas; and (3) toward predominantly partisan Democrat regions and away from Republican-leaning areas.*

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* In California's June 2, 1992, congressional primary election, taken on an aggregate basis, each vote cast in the 17

Given the huge deviations or variances in actual votes cast that exist under the new plan, the district residency restrictions challenged in this case violate the Voter Qualifications and Equal Protection Clauses of the U.S. Constitution. This Court held in Wesberry v. Sanders, 376 U.S. 1 (1964), and Karcher v. Daggett, 462 U.S. 725 (1983), among other cases, that unnecessary deviations in population from district to district violated voters' rights to actual electoral equality. No suggestion was made in those cases, however, that bare population equality alone would serve to insulate a

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districts situated in and around the County of Los Angeles (25th through 41st Congressional Districts) carried approximately 50% more weight than each vote cast in the 17 northernmost districts in the State (First through 17th Districts).

districting plan against electoral equality, or "one person, one vote" challenges. Indeed, the reasoning employed in those cases -- the paramount emphasis placed on actual electoral equality -- itself compels the conclusion that systematic deviations in actual votes cast from district to district also violate all voters' fundamental, constitutionally protected rights to "one person, one vote."[10]

(b) Fundamental rights equal protection.

The district residency restrictions imposed by § 100(a) of the California Elections Code create a classification

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[10] Cf. Judge Kozinski's opinion, concurring and dissenting in part, in Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990) (concluding that "electoral equality" rather than "equality of representation" provides underlying rationale of this Court's one-person, one-vote decisions relating to state and local elections), cert. denied, 111 S. Ct. 681 (1991).

between members of geographical voting groups, on the one hand, and all non-geographical voting groups, on the other.

Under California's new plan, various geographical populations across the State are guaranteed proportional electoral results. At the same time, however, all non-geographical populations and voting groups across the State are forced to compete in artificial winner-take-all competitions to obtain even the most minimal representation (let alone exactly proportional representation).

This classification in turn burdens exercise of the fundamental right to vote. Members of minor or minority non-geographical voting groups -- including all racial minority, female, and young voters specifically protected in each of the Fifteenth, Nineteenth, and Twenty-

sixth Amendments -- have a systematically more difficult time electing candidates of their choice in artificial winner-take-all contests. Additionally, artificial residency restrictions block such minority voters from associating together across district boundaries and combining their votes in support of common candidates.[11]

In the case of Dunn v. Blumstein, 405 U.S. 330 (1972), this Court invalidated a durational residency requirement on similar grounds. The Court found that the one-year residency requirement at issue in the case created a classification between newcomer and

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[11] For description of relation between free association, on the one hand, and the ability of minority voting groups to obtain proportional representation in multi-member legislative bodies, on the other, see Sudgen, Free Association and the Theory of Proportional Representation, 78 Am. Pol.Sci. Rev. 31 (1984).

long-term residents and that this classification in turn burdened all newcomers' exercise of the fundamental right to vote. Finding no justification for this burden, the Court invalidated the one-year residency requirement.

The Court's reasoning in Dunn applies with equal force to the classification present here. The States and Congress simply may not -- consistent with the Equal Protection Clause -- simultaneously guarantee proportional electoral results for all minor or minority geographical populations and voting groups and at the same time deny even the opportunity for proportional representation to all minor or minority non-geographical populations and voting

groups.[12]

(c) 'Separate but equal' districts.

The special masters appointed by the California Supreme Court to draw California's new congressional districting plan admitted that literally their first operational objective was to create racially separate and divided election districts. See Wilson v. Eu, 1 Cal.4th 707, 733 (Jan. 27, 1992) (Mosk, J., dissenting, citing special masters'

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[12] See also Rogers v. Lodge, 458 U.S. 613 (1983) (that government maintained an electoral system with knowledge of its discriminatory effect or impact on protected racial minority voters sufficient to establish violation of Fifteenth Amendment).

Note that Appellants' also present a fundamental rights due process claim in this case. Appellants specifically allege in their thirteenth claim for relief that district residency restrictions violate all voters' interests in substantive due process by blocking establishment of a coherent, rational relationship between actual votes cast and seats won in a State's congressional election.

Report, id. at 769-70). California's new districting plan thus plainly violates this Court's ruling in the landmark case of Brown v. Board of Education, 347 U.S. 483 (1954), and its progeny. In Brown, this Court ruled that racially separate and segregative public educational facilities violate affected school children's rights under the Equal Protection Clause of the Fourteenth Amendment. And, in the years since this ruling, the Court has extended its prohibition against "separate but equal" laws, among other things, to public parks, buses, golf courses, beaches, athletic contests, restaurants, auditoriums, and more recently, public colleges and universities.[13]

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[13] United States v. Fordice, 112 S. Ct. 2727 (June 26, 1992) (colleges and universities); Schiro v. Bynum, 375 U.S. 395 (1964)

The California Supreme Court and its special masters may have been motivated to create racially divided districts in part to follow this Court's construction of the federal Voting Rights Act, 42 U.S.C. 1971, et seq., in the case of Thornburg v. Gingles, 478 U.S. 30 (1986). The Enabling Clauses of the Fourteenth and Fifteenth Amendments, however, do not authorize Congress to enact statutes which affirmatively violate the substantive provisions of those amendments. While Congress does regularly exempt itself from laws it

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(auditoriums); Turner v. City of Memphis, 369 U.S. 350 (1962) (restaurants); State Athletic Comm'r v. Dorsey, 359 U.S. 533 (1959) (athletic contests); New Orleans City Park Imp. Association v. Detiege, 358 U.S. 54 (1958) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf courses); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches).

imposes upon others in our society, it nonetheless may not exempt itself from the requirements of the U.S. Constitution. The Gingles case thus cannot possibly be construed to require or in any way authorize the purposeful racial segregation challenged here.

Applying the territorial residency restrictions imposed by § 100(a) of the California Elections Code to California's new purposely racially separate and segregative election districts violates the equal protection provisions of the Fourteenth and Fifteenth Amendments.

(d) Federal Voting Rights Act.

The 1982 Amendments to the federal Voting Rights Act, 42 U.S.C. 1973(a) & (b), were designed to alter the nature of the racial discrimination required to be shown by challengers in voting rights

cases from discriminatory "purpose" or "intent", to discriminatory "effect" or "impact". Sec. 1973(a) thus provides in part that "[n]o voting qualification or prerequisite to voting ... may be imposed ... which results in a denial or abridgment of the right of any citizen of the United States to vote..." and sec. 1973(b) provides further that "a violation of subsection (a) is established where, taking account of the totality of circumstances,... members of a class of citizens protected by subsection (a) ... have less opportunity than other members of the electorate ... to elect candidates of their choice." (Emphasis supplied.)

The artificial winner-take-all contests established by § 100(a) of the California Elections Code, however, have

a discriminatory effect on protected racial minority voters. Minor or minority geographical voting populations are guaranteed exactly proportional electoral representation and racial majority voters disproportionately benefit from majoritarian, winner-take-all elections. Protected racial minority voters, by contrast, are denied even the opportunity to obtain proportional electoral representation and are disproportionately disadvantaged, compared to majority white voters, by majoritarian, winner-take-all contests. These discriminatory effects, in turn, make plain under this "totality of circumstances" (42 U.S.C. 1973(b)) that racial minority voters have precisely "less opportunity" than "other members of the electorate" (id.) (emphasis supplied)

(both minority geographical voters and majority racial voters) actually to elect candidates of their choice to Congress.

(e) Political speech and association.

The territorial residency restrictions imposed by § 100(a) of the California Elections Code infringe upon core political expression and association interests protected in the First Amendment. The restrictions prevent each voter from participating in more than 98% of the congressional election contests across the State representing more 98% of all of the other voters and candidates in California.

This severe contraction of political rights is not only directed squarely at silencing all non-local, or statewide, political expression (federal voting), but also strongly distorts the protected

"marketplace of ideas" across the State toward majoritarian, and incumbent (or established) ideas and interests, and away from all minor or minority, and challenger (or new) ideas and interests.

Non-residents are prohibited from voting in particular, local district contests precisely because they do not share the peculiar local ideas and interests of its residents.[14] Resulting majoritarian, winner-take-all elections also skew election results systematically toward all major or majority ideas and interests and away from all minor or minority ideas and interests (including those held by racial minority, female,

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[14] For this Court's most-recent case involving content-based speech restrictions under the First Amendment, see R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (June 22, 1992) (invalidating municipal ordinance directed only at racial or ethnic "hate speech").

and young voters specifically protected in each of the Fifteenth, Nineteenth and Twenty-Sixth Amendments).[15]

Finally, these restrictions strongly favor the class of all incumbent candidates and their supporters over the class of all challenger candidates and their supporters. For a variety of reasons, incumbents as a class simply make for stronger, more competitive candidates than challengers. Indeed, in recent years incumbent candidates have enjoyed re-election rates as high as 96 to 98%. With district residency

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[15] For first articulation of "free marketplace of ideas" concept, see Chief Justice Holmes' statement in dissent in Abrams v. United States, 250 U.S. 616, 630 (1919). And compare Chief Justice Holmes' apparent views on the geographically based, single-member district mode of election at issue in the instant case as related by Prof. H.A. Overstreet in a March 4, 1916, article in the New Republic magazine, excerpted in C. Hoag & G. Hallett, Proportional Representation at App. II, p. 303 (1926).

restrictions, however, incumbents rarely if ever have to run against each other for re-election. At the same time, however, challengers almost always have to face and defeat a sitting incumbent to be elected. This discriminatory classification in turn has a devastating effect on the ability of challenger candidates actually to gain election to Congress.[16]

Residency restrictions also impermissibly burden core interests in both intra- and inter-state political association. Like-minded voters and candidates across the State are literally absolutely prohibited from associating

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[16] For a recent decision invalidating election laws found to discriminate against challengers in favor of incumbents, see Service Employees International Union v. Fair Political Practices Commission, 955 F.2d 1312 (9th Cir. 1992) (campaign finance laws invalidated), cert. denied, 112 S. Ct. 3057 (1992).

together at the ballot box to support common candidates and political interests. All voters and candidates are restricted to the narrow confines of their own local districts.

Inter-state association is also burdened. Various minor and minority interests across the nation -- prevented from coalescing within their states and thereby actually electing candidates of their choice -- are also thereby blocked from associating <u>across state boundaries</u> through representatives of their choice <u>within</u> the national House of Representatives.[17]

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[17] For case upholding federal voters' interests in inter-state political association, see, <u>Anderson v. Celebrezze</u>, 460 U.S. 780 (1982) (invalidating restrictions on access to Presidential ballot in part on ground of inter-state freedom of association).

Please note that, contrary to the lower court's apparent assumption, Appellant Rivas, a resident and qualified federal voter

The freedom from association, or against forced political association, is also infringed. With local residency restrictions, all voters are forced in effect to "bloc" vote with their neighbors. And this is so even though they are selecting what is, after all, a statewide, federal representative delegation. Such restrictions severely burden all voters' fundamental interests against forced or compelled political association.[18]

In sum, by blocking voters from taking part in fully 98% of the various

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from Virginia, in fact claims no right to vote in California's congressional elections in this case. Cf. Opinion and Judgment of Dismissal, App. A, infra, at p. 4. Rather, his interest in California's election process comes only through this inter-state association claim.

[18] Cf. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (upholding union members' interests against compelled political association).

federal election contests taking place within their State, the territorial residency restrictions in § 100(a) of the California Elections Code impose severe burdens on the sovereign people of California freely to express their core political ideas and interests -- and to associate and interact freely among themselves -- in selecting their state's federal congressional delegation.

CONCLUSION

The Court should note probable jurisdiction and reverse the judgment of the district court.

Respectfully submitted,

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November 1992

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

CV 92-0510-CAL

TIMOTHY A. DeWITT, PAMELA R. DeWITT-CARTER, DOROTHY S. BALDWIN, RENE A. RIVAS, Plaintiffs,

vs.

THOMAS S. FOLEY, Speaker of the U.S. House of Representatives; PETE WILSON, Governor of the State of California; MARCH FONG EU, Secretary of State of the State of California, Defendants.

OPINION AND JUDGMENT OF DISMISSAL

[Filed Aug. 31, 1992]

Before NOONAN, Circuit Judge, LYNCH and LEGGE, District Judges.

LEGGE, District Judge:

I.

Defendants have moved to dismiss this action pursuant to Federal Rules of Civil Procedure 12(b)3 and 12(b)6. The

motion was opposed, heard and submitted for decision. The court has considered the moving and opposing papers, the record, the arguments, and the applicable authorities. The court concludes that plaintiffs' challenges to district elections are not supported by the United States Constitution, federal statutes, the California Constitution, California statutes, or case law. The court therefore concludes that the action should be dismissed.

II.

Title 28 U.S.C. § 2284(a) provides for a three-judge court "when an action is filed challenging the constitutionality of the apportionment of congressional districts." Defendants argue that plaintiffs are not entitled to this three-judge court because they are

challenging the constitutionality of preestablished districts, rather than the allocation of representatives among those districts. Defendants cite Members of California Congressional Delegation v. Eu, 790 F.Supp. 925, 926 n.1 (N.D. Cal. 1992), for the proposition that "'reapportionment' describes the process of allocating representatives among pre-established districts."

The statute refers to "apportionment," not "reapportionment." Plaintiffs here challenge the fact of apportionment among districts, rather than the manner in which those districts have been drawn. This is sufficient to bring them within the ambit of the statute.

III.

Plaintiffs are three residents of

California's seventh congressional district, and one resident of the state of Virginia. In the 1990 primary and general elections, the California plaintiffs attempted to vote for candidates outside the seventh district by writing different district numbers on their ballots and writing in the names of candidates in those other districts. They allege that they want to associate with like-minded voters across the state to elect congressional representatives. The Virginia plaintiff wants to associate with like-minded Latino voters across state lines by voting in California's congressional elections.

The complaint attempts to allege seventeen claims for relief. The first through ninth and eleventh through fifteenth are that § 100 of the

California Elections Code violates a number of provisions of the U.S. Constitution[1] and the federal Voting Rights Act, 42 U.S.C. § 1971 et seq. The tenth claim is that the creation of special minority districts, which was done in California under the Voting Rights Act, violates the Fourteenth, Nineteenth, and Twenty-Sixth Amendments. The sixteenth claim is that 2 U.S.C. § 2(c), Article XXI, § 1 of the California Constitution, and § 2500 of the California Elections Code, which require the establishment of single-member congressional districts, violate the same provisions of the U.S. Constitution and the Voting Rights Act. Finally, the seventeenth claim is that the recent

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[1] Art. I, § 2, cl. 1, 2, and 3: Art. IV, § 4; and the First, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments.

redistricting by the California Supreme Court, which was considered by this court in Congressional Delegation v. Eu, supra, violated Article I, § 4 of the U.S. Constitution, because such redistricting must be done by Congress or state legislature, and not by the courts.

The gravamen of these claims is that minority groups (whether by race, sex, age or political orientation) are unable to obtain representation in proportion to their numbers; because while they may have enough votes state-wide to elect a representative, they rarely constitute a majority within a congressional district. This allegedly perpetuates a House of Representatives composed of predominantly white male incumbents, in an increasingly heterogeneous society.

IV.

Plaintiffs' complaint concerns both federal and California law.

The U.S. Constitution contains the qualifications for voters and candidates for Congress. Article I, § 2, clause 1 of the United States Constitution sets forth the requirements for persons entitled to vote for representatives as follows (the "Voter Qualifications" clause):

> [T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Clause 2 of that same section sets forth the qualifications for representatives themselves (the "Candidate Qualifications" clause):

> No Person shall be a Representative who shall not have attained to the Age of twenty five years, and been

> seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

The Constitution also empowers both Congress and the state legislatures to make rules governing the time, place and manner of holding these elections. Section 2 of the Fourteenth Amendment amended the third clause of Article I, § 2 (the "Apportionment" clause) to provide that

> Representatives shall be apportioned among the several States according to their respective numbers . . . .

Article I, § 4 provides that

> The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .

Congress' authority here is

paramount. Congress has enacted legislation requiring the states to establish single member districts, 2 U.S.C. § 2(c). That statute requires each state entitled to more than one representative to:

> establish[] by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative . . . .

California's Constitution also requires that the legislature establish, and that representatives be chosen from, single-member districts. Article XXI, § 1, is entitled "Reapportionment," and provides that after each decennial national census, "the Legislature shall adjust the boundary lines of the . . . Congressional . . . districts." The

districts shall be "reasonably equal" in population, and "[e]ach member of the . . . Congress shall be elected from a single member district." Id. at § 1(b), 1 (a).

The California Elections Code also provides for single member districts, and allows voters to vote only in the "territory" in which they reside. California Elections Code § 25000(a) states that "[o]ne Representative [shall be elected to the Congress of the United States] for each congressional district." Section 100(a) provides that otherwise qualified persons "may vote at any election held within the territory within which he or she resides and the election is held." Neither § 100 nor its relatives purport to define "territory." Plaintiffs argue that this section imposes a voter residency requirement not

found in any other constitutional or statutory provision.

V.

Defendants Governor Wilson and Secretary of State Eu move to dismiss the complaints, primarily on the ground that Article I, § 4 of the U. S. Constitution, which gives Congress the authority to prescribe the "times, places and manner" of holding elections for representatives, gives it the power to require that representatives be elected by district. Congress exercised that power in enacting 2 U.S.C. § 2(c), which is binding on the states. Assembly v. Deukmejian, 30 Cal.3d 638, 662: 180 Cal.Rptr. 297, 311 (1982) (2 U.S.C. § 2(c) "forbids the use of-statewide elections to fill congressional seats").

A.

There are no cases squarely defining Congress' power under Article I, § 4 to require that representatives be elected by district. However this court concludes that this power is supported by case law and by documents which are part of the "legislative history" of that article.

As will be discussed below, Congress first exercised that constitutional power in 1842, requiring election by single member districts. In 1879 the U.S. Supreme Court assumed, without discussion, that this exercise of power was constitutional. Congress effectively repealed the requirement that representatives be elected from single member districts in 1929, and reenacted it in 1967. In 1970, a Justice of the

Supreme Court concluded that "the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of Congressional districts." Oregon v. Mitchell, 400 U.S. 112, 121 (1970) (opinion of Black, J.).

B.

At the Constitutional Convention of 1787, the Committee of Detail proposed draft language similar to the final version of Article I, § 4:

> The times and places and manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time be altered by the Legislature of the United States.

Madison, Notes of Debates in the Federal Convention of 1787 (Ohio Univ. Press 1966) at 387.

Two delegates opposed giving Congress any power over such matters, contending that the states could and must be relied upon. Madison addressed the Convention:

> [T]he legislatures of the States ought not to have the uncontrolled right of regulating the times places and manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should . . . be divided into districts or all meet at one place, should all vote for all the representatives; or all in a district vote for a number allotted to the district . . . .

Id. at 423-24 (emphasis added).

Three other delegates agreed that Congress should have the ultimate authority over the time, place, and manner of choosing representatives, and the debate was at an end. The draft was

adopted unanimously. Id. at 424-25. That is clear evidence that the power to prescribe the "places and manner" of elections, reposed in the first instance in the several States and ultimately in the Congress, includes the power to prescribe that they be held by district. See Wesberry v. Sanders, 376 U.S. 1, 33-34 (1964) (Harlan, J., dissenting) ("These remarks of Madison . . . [s]upported by others at the Convention, and not contradicted in any respect . . . indicate as clearly as may be that the Convention understood the state legislatures to have . . . the power to district well or badly, subject only to the supervisory power of Congress. . . . The debates in the ratifying conventions, as clearly as Madison's statement . . . indicate that under § 4, the State

legislatures, subject only to the ultimate control of Congress, could district as they chose").

This conclusion is bolstered by the U. S. Supreme Court's observation that:

> Madison in The Federalist described the system of division of States into congressional districts, the method which he and others assumed states probably would adopt: "The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of Federal Representatives."

Wesberry v. Sanders, 376 U.S. 1, 15 (1964) (quoting The Federalist, No. 57 (Cooke ed. 1961), at 389). See also, The Federalist No. 56 (dividing large states into districts promotes knowledge of local interests); Oregon v. Mitchell, 400 U.S. 112, 120 n.2 (1970) ("[The state legislatures] might make an unequal and

partial division of the states into districts for the election of representatives . . . . Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy" (quoting Mr. Parsons of the Massachusetts ratifying convention)).

It is true, as argued by plaintiffs, that six or seven of the conventions of the thirteen ratifying states proposed that Congress' power to modify the regulations adopted by the states be limited to situations where the states "shall neglect, or refuse or be unable" to make such regulations. See Cong. Globe, 27th Cong., 2d Sess., 465-66 (remarks of Sen. Wright). However, as the Supreme Court has noted, "Such an amendment was never adopted." Oregon v.

Mitchell, 400 U.S. at 119 n.2.[2]

After considering the history of Article I, § 4, Justice Black concluded that:

> the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts. In the ratifying conventions speakers argued . . . that Congress would "most probably lay the state off into districts." And in Colegrove v. Green, 328 U.S. 549 (1946), no justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.

Oregon v. Mitchell, 400 U.S. 112, 121

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[2] Even among these states, New York observed that "nothing contained in the said Constitution is to be construed to prevent the Legislature of any State from passing laws . . . to divide such State into convenient districts, and to apportion its Representatives to and amongst such districts." Remarks of Sen. Wright, supra, at p. 466 (emphasis added).

(1970) (opinion of Black, J.).

C.

Congress did not exercise its power to require that states elect representatives by district until 1842. 5 Stats. 491. Congress' efforts in that regard were summarized by the Supreme Court in Colegrove v. Green, 328 U.S. 549 (1946):

> Until 1842 there was the greatest diversity among the states in the manner of choosing Representatives because Congress had made no requirement for districting. Congress then provided for the election of Representatives by districts. Strangely enough, the power to do so was seriously questioned: it was still doubted by a Committee of Congress as late as 1901. In 1850 Congress dropped the requirement. The Reapportionment Act of 1862 required that the districts be of contiguous territory. In 1872 Congress added the requirement of substantial equality of inhabitants. This was reinforced in 1911. But the

> 1929 Act . . . dropped these requirements.

Id. at 555 (citations omitted). In Wood v. Broom, 287 U.S. 1 (1932), the Court held that Congress' omission of the compactness, contiguity, and equality of population requirements from the 1929 Act effectively repealed these requirements. Id. at 6-7. Congress took no further action to require election by single member districts until it passed the statute presently in force, 2 U.S.C. § 2(c), in 1967. 81 Stat. 581.

D.

This long and continuous interpretation of Congress' powers under Article I, § 4 is persuasive.

In Smiley v. Holm, 285 U.S. 355 (1932), the Supreme Court stated:

> The practical construction of Article I, section 4, is impressive. General

> acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political right and hence subject to constant and careful scrutiny. Certainly, the terms of the constitutional provision furnish no clear and definite support for a contrary construction as to justify disregard of the established practice in the States.

Id. at 369 (citations omitted).

Congress' exercise of its power to require elections by single-member districts over the past 150 years, coupled with the Supreme Court's tacit approval, in Ex Parte Siebold, 100 U.S. 371 (1879); Ex Parte Yarbrough, 110 U.S. 651 (1884); United States v. Gradwell,

243 U.S. 476 (1917);[3] Smiley v. Holm; United States v. Classic, 313 U.S. 299 (1941);[4] Oregon v. Mitchell, and Buckley v. Vallejo, 424 U.S. 1 (1976),[5] constitute a "long and continuous interpretation" that such action is constitutional.

We also note two recent decisions of the Court which have upheld congressional

---

[3] "Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise under this constitutional sanction in the prescribing of regulations for the conduct of elections for Representatives in Congress or in adopting regulations which States have prescribed for that purpose has been settled by repeated decisions of this court." Id. at 482 (citations omitted).

[4] "[T]he states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under the Necessary and Proper clause]." Id. at 315 (citations omitted).

[5] "The constitutional power of Congress to regulate federal elections is well established . . . ." Id. at 13 (citations omitted).

discretion, U.S. Department of Commerce v. Montana, ___ U.S. ___, 112 S.Ct. 1415 (1992), and state discretion, Burdick v. Takushi, ___ U.S. ___, 112 S.Ct. 2059 (1992) in voting rights limitations.

E.

Plaintiffs argue that whatever Congress' power under Article I, § 4, it cannot exercise that power in a way that alters the qualifications of candidates and voters. They contend that limiting voters to the districts in which they live imposes a "qualification" on them not authorized by the U. S. Constitution. As Alexander Hamilton stated in The Federalist, No. 60:

> [Congress'] authority would be expressly restricted to the regulation of the times, the places, and the manner of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion,

> are defined and fixed in the constitution; and are unalterable by the legislature.

(quoted with approval in Powell v. McCormack, 395 U.S. 486, 539 t1969) ("immutability of qualifications set forth in [Article I, § 2, cl. 2 of] the Constitution").

The Powell Court approved the decision of Congress in the 1807 election case of William McCreery of Maryland. Maryland had enacted a law requiring one of the two representatives from Baltimore County to be a resident of Baltimore City. Mr. McCreery was duly elected, but his residence was questioned. The House Committee of Elections recommended that he be seated, because it

> considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the

> Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them . . . .

Powell, 39S U.S. at 542-43 (quoting 17 Annals of Cong. 872 (1807)).

The Committee concluded that the local residency requirement was an attempt by the state of Maryland to impose an additional qualification on members, and was therefore unconstitutional. 1 A. Hinds, Precedents of the House of Representatives of the United States § 414 (1907). However, even those who urged this position were of the opinion that:

> The States might establish districts, but they might not prescribe that Representatives should be confined to the districts.

Id. at p. 383.

Similarly, Article I, § 2, clause 1

of the Constitution prescribes the qualifications for voters in congressional contests in the states, which the states may not alter:

> The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualifications of voters for those eo nomine. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

Yarbrough, 110 U.S. at 663. And in Oregon v. Mitchell, 400 U.S. 112, (1970), Justice Black opined that:

> Surely no voter qualification was more important to the Framers than the geographical qualification embodied in the concept of congressional

> districts. The Framers expected Congress to use this power to eradicate "rotten boroughs," and Congress has in fact used its power to prevent States from electing all Congressmen at large.

Id. at 122 (opinion of Black, J.) (emphasis in original).

Plaintiffs argue the following analogy: just as imposing a residency requirement on candidates violates the candidate qualifications clause, imposing a residency requirement on voters violates the voter qualifications clause. So long as a candidate is a resident of the state, he or she may run for any seat in the state; so long as a voter resides in the state, he or she may vote for any candidate running in any congressional contest in the state. But plaintiffs' analogy is artificial and is not consistent with the language of Article

I, Section 2.

The candidate qualifications clause states that "[n]o person shall be a Representative who shall not . . . when elected, be an Inhabitant of that State in which he shall be chosen." U.S. Const. Atr. I, Sec. 1, cl. 2. The clause prescribes a closed-universe of "qualifications" for representatives, which may not be added to, subtracted from, or altered. One of the "qualifications" enumerated is residency within the state.

The voter qualifications clause, on the other hand, states that representatives shall be chosen by electors who "shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature." U.S. Const. Art., I, Sec.

1, cl. 1. In California, that branch is the state Assembly, whose members are elected in single-member districts. Thus, if the geographic location of electors within a state were deemed a "qualification," voters could only vote for representatives by Assembly district, resulting in a congressional delegation either larger or smaller than that prescribed by Congress under Article 1, Sec. 2, cl. 3.

The requirement that voters reside within the congressional district in which they vote is therefore more properly understood as a restriction on the "place" or "manner" of election, which both Congress and the state legislature are empowered to prescribe.

This distinction is also implicitly recognized in California Elections Code §

100(a), challenged by plaintiffs, which provides that:

> Every person who qualifies under Section 2 of Article II of the Constitution . . . may vote at any election within the territory within which he or she resides.

(Emphasis added.) Article II, Section 2 of the California Constitution provides that "A United States citizen 18 years of age and resident in this state may vote." These are the only "qualifications" imposed on voters.

F.

Congress' authority to require that elections be held by single-member districts can no longer be seriously questioned. The "antiquated states-rights doctrine" relied upon by those who originally opposed Congress' exercise of this power has been discredited, as noted by the majority in

Parsons v. Sanders [full cite]. And it is settled law that the Framers intended to give Congress and the states the power to draw congressional districts as a part of the "manner" of elections.

The states' power to regulate the "time, place and manner" of congressional elections within its borders is coextensive with that of Congress, although Congress' authority is paramount. The power is conferred by the same words, in the same section of the same instrument. Therefore, since 2 U.S.C. § 2(c) is constitutionally valid, so are the California constitutional and statutory provisions challenged by plaintiffs.

VI.

Plaintiffs argue that Article I, § 4 does not answer their claims based on

subsequent amendments to the Constitution-the First, Tenth, Fourteenth, Fifteenth, Nineteenth and Twenty-Sixth amendments, the violation of which is alleged in their fourth and sixth through thirteenth claims. Specifically, plaintiffs argue that district elections discriminate in favor of incumbent candidates in violation of the First Amendment, and that the establishment of special minority districts under the Voting Rights Act violates the prohibition against "separate but equal" in the Fourteenth and Fifteenth amendments, and articulated by the Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954). Plaintiffs argue that these subsequent amendments "trump" whatever power was conferred by Article I, § 4, and that

Article I power cannot be exercised inconsistently with those amendments. In view of the authorities cited above in section V above, we need discuss only two specific claims made by plaintiffs.

Plaintiffs' fourth claim is that the residency requirement violates the one-person, one-vote principle of the Voter Qualifications clause and the Equal Protection clause of the Fourteenth Amendment, because of the "physical impossibility of ensuring" that the districts will contain "exactly equal numbers of people." However, the U. S. Supreme Court recently reaffirmed the holding of Wesberry v. Sanders, 376 U.S. 1 (1964) that those provisions only require states to "make a good-faith effort to achieve precise mathematical equality." United States Dept. Commerce

v. Montana, 112 S.Ct. 1415, 1418 (1992) (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969)). Exact equality is not required.

Plaintiffs' ninth claim is that the residency requirements result in winner-take-all contests that "deprive racial minority groups of even the opportunity to obtain representation in proportion to their voting strength," in violation of the Voting Rights Act, 42 U.S.C. § 1971 et seq. The basic objective of the Voting Rights Act is to protect minority voting opportunities, which objective has been pursued in the reapportionment of California's congressional districts. Even if that objective were not, as plaintiffs allege, fully accomplished, a later statute cannot "trump" the original provisions of

the Constitution. The Constitution must be superior.

District elections are so fundamental to the political system devised by the Framers in the Constitution that none of the amendments to the Constitution should be construed to alter it by inference.

VII.

Certain additional arguments of the parties need be answered only briefly.

Plaintiffs' seventeenth claim is that the California Supreme Court had no authority to draw congressional districts, and that "[I]f the people and their elected representatives fail to establish congressional districts desired, but not established, by Congress, Congress's remedy under the elections clause lies not in the courts

but in itself." However, there is a long history of court participation in redistricting when the elected branches do not do so. See authorities cited in Members of California Congressional Delegation v. Eu, 790 F.Supp. 925 (N.D. Cal. 1992).

Defendants argue that venue in this district is improper and that plaintiffs are guilty of laches. In view of the conclusions which this court reaches above, no further consideration of these arguments is necessary. For the same reasons, the motions which have been filed by plaintiffs and by defendant Thomas S. Foley after the submission of this motion to dismiss are denied.

IT IS THEREFORE ORDERED that defendants' motion is granted and the action is dismissed. Because the

infirmities of the complaint are matters of law and could not be corrected by amendment, the dismissal is without leave to amend. A judgment of dismissal is hereby entered.

Dated: August 31, 1992.

[signed]

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

[signed]

JOHN T. NOONAN, JR.
CIRCUIT JUDGE

[signed]

EUGENE F. LYNCH
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. CV-92-0510-CAL

TIMOTHY A. DeWITT, PAMELA R. DeWITT-CARTER, DOROTHY S. BALDWIN, RENE A. RIVAS, Plaintiffs,

vs.

THOMAS S. FOLEY, Speaker of the U.S. House of Representatives; PETE WILSON, Governor of the State of California; MARCH FONG EU, Secretary of State of the State of California, Defendants.

[Stamped: Filed Sept. 11, 1992]

NOTICE OF APPEAL

TO THOMAS S. FOLEY, Speaker of the United States House of Representatives; PETE WILSON, Governor of the State of California; MARCH FONG EU, Secretary of State of the State of

California, and DANIEL E. LUNGREN, LINDA A. CABATIC, ALLEN H. SUMNER, and STEVEN R. ROSS, CHARLES TIEFER, and MICHAEL L. MURRAY, their attorneys of record:

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. § 1253 and Supreme Court Rules 18, Plaintiffs TIMOTHY A. DeWITT, PAMELA R. DeWITT-CARTER, DOROTHY S. BALDWIN, and RENE A. RIVAS will and hereby do appeal in its entirety as to all issues raised in the above-captioned action this Court's summary final Opinion and Judgment of Dismissal with prejudice of August 31, 1992.

Dated: September 11, 1992.

Respectfully submitted,

Arlo Hale Smith -- Bar No. 96971
Timothy A. DeWitt -- Bar No. 150631

By: [Signed]
Timothy A. DeWitt

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. CV-92-0510-CAL

TIMOTHY A. DeWITT, et al.,

Plaintiffs,

vs.

THOMAS S. FOLEY, et al.,

Defendants.

[Stamped: Filed Sept. 11, 1992]

CERTIFICATE OF SERVICE

I, Timothy A. DeWitt, do hereby certify that on this 11th day of September, 1992, I served the Notice of Appeal filed herewith by first-class mail, postage pre-paid, on the following:

Michael L. Murray, Esq.
Assistant General Counsel
Clerk to the U.S. House of
Representatives
The Capitol, H-112
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Fong Eu)

[Signed]
Timothy A. DeWitt

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clauses 1, 2, and 3 of the United States Constitution provide:

> The House of Representatives shall be composed of Members chosen every second Year by the people of the several States, and the Electors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to service for a Term of Years, and including Indians not taxed, three-fifths of all other Persons....

2. Article I, Section 4 of the U.S. Constitution provides:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Place of Choosing Senators.

3. Article IV, Section 4 of the U.S. Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government....

4. Amendment I of the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5. Amendment X of the U.S. Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

6. Amendment XIV, Section 1 of the U.S. Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

7. Amendment XV, Section 1 of the U.S. Constitution provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

8. Amendment XIX, Section 1 of the U.S. Constitution provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

9. Amendment XXVI, Section 1 of the U.S. Constitution provides:

> The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

10. The federal Voting Rights Act, 42 U.S.C. 1973(a) & (b) provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect candidates of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

11. The Act of Dec. 14, 1967, 81 Stat. 581, now codified at 2 U.S.C. 2c (1967), provides:

> [T]here shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative.

12. Article XXI, Section 1 of the California State Constitution provides:

> In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Legislature shall adjust the boundary lines of the...Congressional...districts in conformance with the following standards: (a) Each member of...Congress...shall be elected from a single-member district....

13. California Elections Code, Division 1. Voters, Chapter 1. Qualifications, Sec. 100(a) provides:

> Every person who qualifies under Section 2 of Article II of the Constitution and who complies with...this code governing the registration of electors may vote at any election held within the territory within which he or she resides and the election is held.

14. Section 25000 of the California Elections Code provides:

> At each general election there shall be elected to the Congress of the United States: (a) One Representative from each Congressional district....